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Michael R. Murray v. Utah Labor Commission, Utah State Parks and Recreation, and Workers Compensation Fund : Brief of Appellee

Utah Supreme Court

Utah Supreme Court

Michael R. Murray Petitioner and Appellant vs. ***Utah Labor Commission,*** ***Utah State Parks & Recreation,*** **and *Workers Compensation Fund*** Respondents and Appellees	*	Case No.: 20120232-SC Agency Case No.: 08.1121

BRIEF of UTAH STATE PARKS AND RECREATION
and WORKERS COMPENSATION FUND

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vs.	*	
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Statement of Jurisdiction

We defer to Mr. Murray's statement of jurisdiction.

Court of Appeals Citation

Murray v. Labor Commission, 2012 UT App 33, 271 P.3d 192.

Statement of the Issues and Standards of Review

This Court has granted certiorari specifically to address two issues: (1) whether the court of appeals applied the correct standard of review, and (2) whether the Labor Commission and the court of appeals properly applied the test for legal causation laid out in the seminal Utah Supreme Court case of *Allen v. Industrial Commission*.[1] Throughout this brief, we will refer to that as "the *Allen* test" or "the *Allen* standard."

The appropriate standard of review is, of course, a key question before this Court. The court of appeals, guided by the Utah Administrative Procedures Act[2] and significant caselaw, used an abuse-of-discretion standard to review the Labor Commission's decision. To determine whether the Commission abused its discretion, the court of appeals applied a test of reasonableness and rationality, looking closely to ensure that the Commission liberally construed and applied the Workers' Compensation Act in favor of the injured employee.[3]

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[1] 729 P.2d 15 (Utah 1986).

[2] Specifically, Utah Code Ann. § 63G-4-403(4)(h)(i).

[3] *Murray v. Labor Commission*, 2012 UT App 33 at ¶ 27, 271 P.3d 192, 701 Utah Adv. Rep. 28.

Determinative Statutes

UTAH CODE ANN. § 63G-4-403. Judicial Review – Formal Adjudicative Proceedings.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

. . . .

(d) the agency has erroneously interpreted or applied the law;

. . . .

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

UTAH CODE ANN. § 34A-1-301. Commission Jurisdiction and Power.

The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers.

UTAH CODE ANN. § 34A-2-401. Compensation for industrial accidents to be paid.

(1) An employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self inflicted, shall be paid:

(a) compensation for loss sustained on account of the injury or death;
(b) the amount provided in this chapter for:

(i) medical, nurse, and hospital services;
(ii) medicines; and

(iii) in case of death, the amount of funeral expenses.

(2) The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be:

(a) on the employer and the employer's insurance carrier; and
(b) not on the employee.

(3) Payment of benefits provided by this chapter or Chapter 3, Utah Occupational Disease Act, shall commence within 30 calendar days after any final award by the commission.

Statement of the Case and Facts

We defer to the court of appeals' recitation of the facts and procedural history, along with those of the Labor Commission in the orders attached to Mr. Murray's brief. We note that the facts are not a subject of this review.

Summary of Argument

Mr. Murray had a pre-existing condition that subjects him to the higher standard for proving legal causation laid out in *Allen*. The Labor Commission considered his accident and determined that it did not involve unusual or extraordinary conditions and thus did not increase the risk of injury that we all face in typical non-employment life. Based on this, the Commission found that Mr. Murray could not carry his burden of proving legal causation and thus his injuries are not compensable under the Utah Workers' Compensation Act. The court of appeals used an appropriate standard of review to examine the Commission's decision and found – using an appropriate application of the *Allen* standard – that the Commission's decision was reasonable and

rational and thus not an abuse of its discretion to apply the Workers' Compensation Act. The court of appeals' analysis is in perfect keeping with the plain language of the Utah Administrative Procedures Act as well as the plain language and the intent of the *Allen* decision. This Court should affirm the court of appeals' decision.

Argument

Issue #1: Standard of Review. Under the Utah Administrative Procedures Act, if an agency has a statutory grant of authority to apply the law at issue, appellate courts should use an abuse-of-discretion standard when reviewing the agency's action. The Labor Commission Act grants the Commission authority to apply the Workers' Compensation Act. This case involves the Commission's application of the Workers' Compensation Act. Did the court of appeals err in using an abuse-of-discretion standard of review?

After a thorough survey of relevant statues and caselaw, the court of appeals determined that the Commission's decision in this case is subject to an abuse-of-discretion standard of review. Mr. Murray takes issue with this conclusion. The court of appeals is right.

The court of appeals looked first to the Utah Administrative Procedures Act ("UAPA") to determine the appropriate standard of review, noting that this Court "has held that the several grounds for judicial relief set forth in what is now section 63G-4-403(4) necessarily 'incorporate[] standards that appellate courts are to employ when

reviewing allegations of agency error.'"[4] Writing for the court, Judge Voros noted that "mixed questions of law and fact are generally reviewed for correctness, granting no deference to the agency"[5] but "'a[n] exception to this general rule exists if the legislature has either explicitly or implicitly granted discretion to the agency' to interpret or apply the law."[6] The court went on to explain that, "When a statute delegates discretion to the agency, the court reviews the agency action under Utah Code section 63G-4-403(4)(h)(i), which authorizes relief when agency action constitutes 'an abuse of the discretion delegated to the agency by statute.'"[7]

After identifying the potential standards for mixed questions of law and fact, the court of appeals looked next to determine whether the legislature has granted the Labor Commission discretion to apply the law. The law at issue in this case is UTAH CODE ANN. § 34A-2-401. Specifically, the core dispute is whether or not Mr. Murray's claimed injuries arose out of his employment. To determine whether the Commission has discretion to apply this section, the court of appeals looked at the Labor Commission Act, which provides that "The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or

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[4] *Murray* at ¶ 11 (quoting *Morton Int'l, Inc. v. Utah State Tax Comm'n,* 814 P.2d 581, 584 (Utah 1991)).
[5] *Id* at ¶ 12 (citing *Morton Int'l* at 587-588).
[6] *Id* at ¶ 12(quoting *Esquivel v. Labor Commission*, 2000 UT 66, ¶ 14, 191 P.2d 1352).
[7] *Id*.

chapter it administers."[8] The Utah Workers' Compensation Act is a chapter that the Labor Commission administers.[9] In fact, the Labor Commission has exclusive jurisdiction to hear and decide claims from injured workers seeking benefits under the Workers' Compensation Act.[10] Because of this, the court of appeals found that the Commission has statutory discretion to apply the law at issue and thus UAPA requires an abuse-of-discretion standard of review in this case.

Murray argues that the court of appeals' analysis on this point is inconsistent with *Esquivel v. Labor Commission*.[11] In that case, this Court noted that:

> We have never previously viewed Utah Code Ann. § 34A-1-301 as a broad grant of discretion to the Labor Commission. In fact, we have, upon numerous occasions since this statute became effective July 1, 1997, reviewed Commission decisions concerning questions of law under the correctness standard. . . . We are not convinced, and do not conclude that section 34A-1-301 provides a general grant of discretion to the Labor Commission for statutory *interpretation*.[12]

But the court of appeals distinguishes *Esquivel* by pointing out that it examined the question of whether section 34A-1-301 grants the Commission discretion to *interpret*

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[8] UTAH CODE ANN. § 34A-1-301 (2011).
[9] UTAH CODE ANN. § 34A-1-103 and 104 (2011).
[10] *Sheppick v. Albertson's, Inc.*, 922 P.2d 769 (Utah 1996); *Woldberg v. Industrial Comm'n*, 74 Utah 309, 279 P. 609, 611 (1929); *United States Smelting, Ref. & Mining Co. v. Evans*, 35 F.2d 459, 461 (8th Cir. 1929), cert. denied, 281 U.S. 744, 50 S. Ct. 350, 74 L. Ed. 1157 (1930).
[11] 2000 UT 66, 191 P.2d 1352.
[12] *Id* at ¶ 17-18 (internal citations omitted) (emphasis added).

the law. Judge Voros noted that "this limitation on the Commission's discretion to *interpret* the law does not extend to its discretion to *apply* the law."[13]

While this distinction may seem narrow on its face, a deeper examination reveals that it is a very worthy difference to point out. In *Esquivel*, this Court examined the Commission's *interpretation* of UTAH CODE ANN. § 34A-2-106(5) – a provision that addresses disbursement of a third-party recovery. After referencing "numerous occasions" when the Court reviewed questions of law under a correctness standard since July 1, 1997, the *Esquivel* court cited four cases: (1) *Vigos v. Mountainland Builders, Inc.*, which examined the Commission's *interpretation* of a statute of limitation in the Workers' Compensation Act;[14] (2) *Christensen v. Spanish Fork City* – a companion case to *Vigos* that reviewed the Commission's *interpretation* of the same statute and included no discussion of the standard of review;[15] (3) *Olsen v. Samuel McIntyre Inv. Co.*, where this Court examined the *interpretation* of a notice provision and stated that it was reviewing the *court of appeals'* interpretation of the section for correctness, not the Commission's,[16] and; (4) *Brown & Root Industrial Serv. v. Industrial Comm'n*, which involved the question of whether an amendment to the Workers' Compensation Act

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[13] *Murray* at ¶ 20 (emphasis in original); *see also Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, 164 P.3d 384 (pointing out *Esquivel*'s holding that section 34A-1-301 does not grant the Commission discretion for statutory *interpretation*).

[14] 2000 UT 2; 993 P.2d 207.

[15] 2000 UT 13; 994 P.2d 1252.

[16] 956 P.2d 257, 259 (Utah 1998).

should apply retroactively – a question that the Court explicitly labeled one of statutory construction (i.e., *interpretation*).[17]

The Labor Commission is an administrative agency with a very specific statutory charge to administer the Labor Code. It is not a court of general jurisdiction and thus is not typically in the business of *interpreting* statutes. But in this case, the dispute does not involve any statutory construction or other *interpretation* of the law. In fact, the *Allen* court already provided the relevant interpretation of the statutory provision at issue. The dispute involves the Commission's *application* of the *Allen* standard to the facts of Mr. Murray's case, and the court of appeals is right that this is something that the legislature has explicitly granted the Commission discretion to do.

Mr. Murray argues that section 34A-1-301 is simply a recognition that "the administrative law judges, commissioners, and the appeals board at the Labor Commission have similar powers and authorities of judges in the Utah court system" with respect to the Workers' Compensation Act and other laws it administers.[18] In his words, that section "basically declares their authority to do the job given them."[19] While we aren't completely on board with the comparison to judges in the district or appellate courts, we agree that section 34A-1-301 is an enabling provision of sorts in that it grants

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[17] 947 P.2d 671, 675 (Utah 1997).
[18] Br. of Pet. at 19.
[19] Id.

the Commission the authority and discretion to do its job. *And its job is to apply the Workers' Compensation Act*.

If the Labor Commission has not been granted discretion to apply the Workers' Compensation Act, then what does it possibly have discretion to do? As this court pointed out in *Sheppick*:

> The whole scheme of the Workers' Compensation Act contemplates that only the Commission can make awards of benefits under the Act and the necessary factual and legal conclusions in support thereof. Not only do the terms of the Act refer exclusively to the Commission in those sections dealing with the adjudication of claims and the award of benefits, but the Commission itself is intended to develop and apply the kind of expertise that grows out of the special situations to which the Act applies and to give full force to the remedial provisions of the Act.[20]

Considering this explanation, we believe that the court of appeals was exactly right when it held that "section 34A-3-301 explicitly gives the Commission discretion to apply the law to the cases before it, including those involving the Workers' Compensation Act and the 'arising out of' provision of section 34A-2-401(1)."[21]

Finally, Mr. Murray argues that *Drake v. Industrial Commission*[22] introduced a standard of review that displaces the UAPA standards. *Drake* examined a course-and-scope-of-employment question centered on the long-established "going and coming" doctrine, which generally views employees as outside the course of their employment while traveling to and from work, and the "special errand" rule, which is a recognized

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[20] *Sheppick v. Albertson's, Inc.*, 922 P.2d 769, 775 (Utah 1996).
[21] *Murray* at ¶ 21.
[22] 939 P.2d 177 (Utah 1997).

exception to the going and coming doctrine. In addressing the standard of review, the *Drake* court appealed to the influential criminal case of *State v. Pena,*[23] which prescribed an analysis that considers "the factual complexity of the legal standard at issue, the reliance of the legal standard on facts observed by the fact finder, and other policy considerations."[24]

The *Drake* court went on to apply the *Pena* analysis to the special-errand case before it. In determining the appropriate standard of review, the court considered the "highly fact-sensitive" nature of special-errand cases, the fact that the court "has had few occasions to address particular fact situations to which the special errand rule arguably applies," making it unlikely that it could craft a broadly applicable legal rule, and the general policy that courts should construe the Workers' Compensation Act liberally in favor of coverage.[25] From those factors, the court extracted a standard for reviewing special-errand cases that "'conveys a measure of discretion to [the Commission] when applying that standard to a given set of facts.'"[26]

As Judge Voros points out, the *Drake* court did not give any direct insight into "[w]hether this measure was a millimeter or a mile."[27] Instead, the *Drake* court simply

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[23] 839 P.2d 932 (Utah 1994).
[24] *Murray* at ¶ 23.
[25] *Drake*, 939 P.2d at 182.
[26] *Id.* (quoting *Pena*, 869 P.2d at 939) (bracketed material in original).
[27] *Murray* at ¶ 24.

said that it was "disposed to give heightened deference to the Commission" but, because of the policy considerations, still "exercise some scrutiny."[28]

In 2007, this Court revisited its standard-of-review analysis from Drake when it decided *Salt Lake City Corp v. Labor Commission*.[29] In that case, the Court examined the going-and-coming rule more generally and applied a "conditionally deferential" standard of review grounded in two considerations: (1) the fact that "the multifarious array of factual settings presented by scope-of-employment cases" makes it difficult for the Court to "craft coherent and evolving legal rules," and (2) the Court's "statutory obligation to give effect to the Act's purpose" compels it to "look closely to assure ourselves that the Commission has liberally construed and applied the act to provide coverage and has resolved any doubt respecting the right to compensation in favor of an injured employee."[30]

Mr. Murray maintains that this is the standard that should apply to his case. He argues that "[t]he fact that *Drake* and *Salt Lake City Corp*. are 'course of employment' cases . . . and [this] case . . . is an 'arising out of . . . employment' case provides no good rationale for utilizing a different standard of review." We disagree. There are several good reasons to apply a different standard to the immediate case than the one applied in *Drake* and *Salt Lake City Corp.*

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[28] *Drake*, 939 P.2d at 182.
[29] 2007 UT 4, 153 P.3d 179.
[30] *Salt Lake City Corp.*, 2007 UT 4, ¶ 14-16.

First, the standard in *Drake* and *Salt Lake City Corp* was explicitly based primarily on two things that are very specific to those cases: (1) the very nature of going-and-coming cases, and (2) the fact that there is not much appellate caselaw examining the fact situations that might fall within the going-and-coming and special-errand doctrines and the resulting difficulty in crafting a widely applicable legal rule for those cases. Since this is not a going-and-coming case, these factors do not apply. While "arising out of" cases like this one may be highly fact-driven, there is already a widely applicable legal rule for those cases. In fact, it may be the most well-known and influential rule in all of Utah workers' compensation law – namely, the *Allen* standard itself. The *Allen* standard is the very type of "coherent and evolving legal rule" that *Salt Lake City Corp.* explains is lacking in going-and-coming cases.

Next, as the court of appeals points out, this Court has explicitly disclaimed any relevance that *Drake* or *Pena* might have to UAPA standard-of-review cases. Writing for the Court in *Westside Dixon Assocs., LLC v. Utah Power & Light Co./Pacificorp*, Justice Durham pointed out that "all parties to this petition cite *Drake v. Industrial Comm'n* regarding appropriate agency standards of review. We note that *Drake* **was not a UAPA case**, an observation that applies to *State v. Pena* as well."[31] While we understand that *Salt Lake City Corp.* was decided after *Westside Dixon*, we agree with the court of appeals that, "in *Salt Lake City Corp.*, the court did not cite to *Westside Dixon* or discuss

[31] 2002 UT 31, ¶ 8 n.1, 44 P.3d 775 (internal citations omitted) (emphasis added).

Westside Dixon's gloss on *Drake*. We therefore do not understand the supreme court to have jettisoned *Westside Dixon* on this point."[32]

Mr. Murray's case *is* a UAPA case, and that alone is ample reason not to apply the *Drake* standard of review here. It would be difficult to justify substituting a standard borrowed from criminal law in a non-UAPA case that examines a wholly different doctrine under a different clause in the law for a standard rooted in statute that directly addresses appeals from administrative agencies, like this one. We believe that the court of appeals, in its careful and thorough analysis, got the standard-of-review issue right and we urge this Court to affirm their decision.

1.1: A Practical Concern

The policy that the Workers' Compensation Act should be liberally construed in favor of finding coverage is a very longstanding concept that is commonly referred to as "the liberality rule." An examination of its lineage reveals that Utah appellate courts have acknowledged and applied that policy since at least 1919 – two years after the Workers' Compensation Act was first enacted in its original form.[33] The same examination reveals that, since then, it has primarily been applied in course-and-scope-of-employment cases and other cases where the court is trying to determine whether a set of facts appropriately brings a claim under the umbrella of workers' compensation

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[32] *Id* at ¶ 15.

[33] *Chandler v. Industrial Comm'n*, 55 Utah 213, 184 P. 1020, 1021-22 (1919).

coverage.[34] This is understandable in light of the long-recognized fact that the "whole purpose, plan and intent" of the Workers' Compensation Act is to replace common-law tort remedies and "to provide a simple, adequate and speedy means to all applicants for compensation to have their applications heard and determined upon the merits, and to have the acts of the Commission as speedily reviewed by this court by any interested party if he thinks that the Commission has exceeded its powers or has disregarded some provision in the statute."[35]

While it makes sense that, given that purpose, courts should construe the Act liberally to find *coverage* and bring people into the administrative structure where a remedy is ostensibly more easily accessible, the difficulty arises when considering the idea that appellate courts will look to ensure that the Commission "resolve[s] ***any doubt*** *respecting the right to compensation* in favor of an injured employee."[36]

Such incredibly liberal language is extremely difficult to reconcile with another long-established standard that the injured employee has the burden to prove entitlement to compensation by a preponderance of the evidence and that "[t]o sustain this burden it is not enough to show a state of facts which is equally consistent with no

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[34] *See generally Jones v. Industrial Comm'n*, 55 Utah 489, 187 P. 833, 836 (1920); *M&K Corp. v. Industrial Comm'n*, 112 Utah 488, 189 P.2d 132, 134 (1948); *Spencer v. Industrial Comm'n*, 4 Utah 2d 185, 290 P.2d 692, 694 (1955); *Maryland Casualty Co. v. Industrial Comm'n*, 12 Utah 2d 223, 364 P.2d 1020, 1022 (1961); *Pinter Construction Co. v. Frisby*, 678 P.2d 305, 306-7 (Utah 1984); *State Tax Comm'n v. Industrial Comm'n*, 685 P.2d 1051, 1053 (Utah 1984).

[35] *Woldberg v. Industrial Comm'n*, 74 Utah 309, 279 P. 609, 611 (1929).

[36] *Salt Lake City Corp.*, 2007 UT 4, ¶ 16 (emphasis added).

right of compensation as it is with such right. Surmise, conjecture, guess, or speculation is not sufficient to justify a finding in the plaintiff's behalf."[37] The phrase "resolve ***any doubt*** respecting the right to compensation in favor of the injured employee" sounds, on its face, like the most generous imaginable standard. In criminal cases, the prosecuting agency typically bears the mother of all burdens of proof: to prove "every element of the charged offenses beyond a reasonable doubt."[38] If courts were to apply a standard that relies strictly on the literal language of the liberality rule, it would represent an even more rigorous standard because it would place the burden, for all practical purposes, on the employer to show – beyond ***any*** doubt – that the injured worker does not qualify for benefits under the Workers' Compensation Act.

Typically, the concepts of burden of proof and standard of review can be cleanly separated and treated independently. But the so-called liberality rule is just a pervading doctrine whose full reach is difficult to understand. While it clearly informs standards of review, it is not in itself a standard of review. Plus, where it calls for such lavish favor to the employee, many view it as wholly inconsistent with the well-established burden of proof. To prove your entitlement to benefits by a preponderance of the evidence means to show that you more likely than not meet the relevant legal standards for a compensable claim. Put another way, employees seeking benefits under the Workers' Compensation Act can prove entitlement to those benefits by showing that their claim

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[37] *Higley v. Industrial Comm'n*, 75 Utah 361, 285 P. 306, 308 (1930).
[38] *State v. Greenwood*, 2012 UT 48, ¶ 21, 717 Utah Adv. Rep. 40.

probably meets the standards for compensability and not merely possibly, meaning that there is more evidence for entitlement to benefits than against.[39] According to this Court, this standard of proof "accommodates the liberal purposes of the act" and is "the type of proof that is likely to be available in most cases of this type."[40]

The consternation with the liberality rule creeps in with the insinuation that the "liberal purposes of the act" are only served by resolving "any doubt" about the right to compensation in favor of the injured employee. Luckily, the practical application of the rule doesn't appear – at least not blatantly – to have been as egregious as such a hyperbolic standard may allow or invite. But, while it is also difficult to gauge exactly how germane such a discussion is to the immediate case, we believe that these apparently incongruent standards pose a significant possibility for dangerous line blurring and some clarification could help practitioners as they try to understand and apply the right guidelines.

Issue #2: The *Allen* Standard. The *Allen* court explained that the legal-causation standard it announced for workers with preexisting conditions is designed to identify injuries that happen "because some ***condition*** or exertion required by the employment increases the risk of injury which the worker normally faces in his everyday life." This standard applies to Mr. Murray's claim. Should this Court limit the *Allen* analysis to

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[39] *Bingham Mines Co. v. Allsop*, 59 Utah 306, 203 P. 644, 645 (1921).
[40] *Lipman v. Industrial Comm'n*, 592 P.2d 616, 618 (Utah 1979).

exertions and ignore or create another standard for the other ***conditions*** of Mr. Murray's accident?

The *Allen* decision is day-one reading for any attorney considering a foray into workers' compensation law in Utah. This Court's opinion in *Allen* probably encapsulates and synthesizes more key tenets of workers' compensation law than any other Utah case. The issue in Mr. Murray's case centers on the more stringent burden of proof that *Allen* prescribes for workers who have pre-existing conditions that contribute to their claimed injuries ("the *Allen* standard"). Mr. Murray spends several pages of his brief dissecting the *Allen* standard and its application to this case. He argues that the Commission misapplied the standard by not considering all of the factors involved in his accident[41] and that the court of appeals somehow compounded the problem by *considering* all of the factors involved in his accident.[42] We maintain that Mr. Murray's position on this issue represents a fundamental misreading of the *Allen* decision and a misunderstanding of what it intended to accomplish.

While we believe that the application of the *Allen* test is the more important of the two issues this Court has agreed to review, we also believe it is the simpler of the two to resolve. This is because the *Allen* opinion itself already addresses all of the misgivings that Mr. Murray has about the outcome of his case at the Labor Commission and court of appeals. We submit that a genuine and thorough reading of *Allen* exposes

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[41] Br. of Pet. at 27.
[42] Br. of Pet. at 29.

that Mr. Murray's position is based on key semantic misconceptions and logical fallacies. Mr. Murray's proposed solution would only confuse and complicate one of the most elegant and widely applied standards in the law.

In arriving at his position, Mr. Murray has necessarily fixated on a single word in the *Allen* decision: ***exertion***. This is somewhat understandable in that the *Allen* opinion uses that word, in one form or another, quite a bit – 88 times, to be exact. But his fixation on and misinterpretation of this word has apparently led him into a logical disconnect that has caused him to miss the point of this Court's holding in *Allen*. The *Allen* standard is designed to test whether an employee's work conditions "increase the ***risk of injury***" that we all face in typical non-employment life.[43] Writing for the majority in *Allen*, Justice Durham explained that "[t]his additional element of risk in the workplace ***is usually supplied*** by an exertion greater than that taken in normal, everyday life."[44] While Mr. Murray concedes at one point that this is an explicit acknowledgment by the Court that something besides exertion can demonstrate an added risk in the workplace,[45] his argument quickly reverts to a premise that the *Allen* standard only contemplates "intentional and exertional workplace activities."[46]

First, Mr. Murray's linking of exertion with intentionality and voluntariness is without basis in *Allen* or any other law. In fact, the *Allen* decision never uses the words

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[43] *Allen*, 729 P.2d at 25 (emphasis added).
[44] *Id.* (emphasis added).
[45] Br. of Pet. at 24.
[46] Id. at 25.

"intentional" or "voluntary." Nevertheless, much of Mr. Murray's argument depends on his insistence that the *Allen* standard only contemplated and only applies cleanly to voluntary physical exertions. His baseless assignment of these volitional traits to the term "exertion" as used in many contexts in *Allen* also demonstrates his narrowing of the definition of that term beyond what the *Allen* court likely intended. This imagined standard begins to expose the logical vulnerabilities of Mr. Murray's position.

To demonstrate the flaws in Mr. Murray's reasoning, please allow me to propose an analogy. Suppose a law school appointed an employee to oversee new admissions to the school. The dean explains to the employee that his charge is to examine each application and determine which candidates meet the program's criteria for admission. Because the school has a policy of offering admission to any candidate with an LSAT score of over 160, the dean explains that the employee will be able to process many applications simply by looking at the field for LSAT score. Where an applicant has an LSAT score of under 160, the employee should consider that score but should also look closely at the applicant's undergraduate program, grade point average, extracurricular activities, and other relevant factors – the four corners of the application. After the employee does this job for a few weeks, the dean starts to receive phone calls from applicants with LSAT scores in the high 150s and exceptional grade point averages and extracurricular activities. These applicants are confused and disappointed because they have received no word from the school about their applications.

When the dean approaches the employee about the situation, the employee responds that his marching orders were to examine only the applicants' LSAT scores. The dean tries to explain that the object was to apply a test of *admissibility* to the school and that the LSAT score was simply one factor in that test. While it was a big factor and probably the most determinative single criterion, it was not the sole design of the test to be applied. The employee cannot see that he has hopelessly confused the overall test with one of its factors.

We submit that this is what has happened here. The test that *Allen* prescribes is designed to determine whether any element of the injured worker's employment increased the risk of injury that we all face in normal, everyday life. The Court explained that the most common way to make that determination will be to examine workplace exertions. Mr. Murray has confounded the object of the test with a factor to be examined in applying it.

It is clear from its opinion that the *Allen* court intended to include factors beyond simple voluntary physical exertions in the analysis of legal causation. After discussing the two-part causation test that Professor Larson described in his treatise and that the Court ultimately adopted in *Allen*, Justice Durham cited seven cases from other jurisdictions that had already adopted that test.[47] Her descriptions of five of those cases include factors beyond physical exertion, including movement, stress and strain, risk of

[47] *Allen*, 729 P.2d at 25 n.7.

falling, gait, and stress of police work.[48] Under Mr. Murray's analysis, inclusion of these factors in a legal causation inquiry would represent an unmerited *extension* of the *Allen* standard. On the contrary, the *Allen* court's reliance on these cases in deciding to adopt the two-part causation test demonstrates clearly that their intent from the beginning was to consider all relevant conditions when examining whether an accident was unusual or extraordinary compared to normal, everyday life.

Toward the end of its opinion, the Court again gave an unmistakable indication of its intent to examine more than intentional physical exertion when considering legal causation. In explaining its decision to remand the case to the Commission for further consideration of legal and medical causation, the Court noted that, because Mr. Allen had prior back problems, "to meet the legal causation requirement he must show that moving and lifting several piles of dairy products weighing thirty to fifty pounds *in the confined area of the cooler* exceeded the exertion that the average person typically undertakes in nonemployment life."[49] This factor of the "confined area of the cooler" is a key inclusion that reveals several important things about the *Allen* court's intended legal-causation standard. First, it demonstrates that the Court expected the Labor Commission, on remand, to consider that non-exertional factor in its examination of legal causation. That alone unravels much of Mr. Murray's position. Furthermore, because that clause is unquestionably characterized as part of an overall "exertion," its

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[48] *Id.*

[49] *Id* at 28 (emphasis added).

inclusion demonstrates that the Court intended that term to encompass many things beyond intentional, easily measured physical exertions.

Further demonstrating this point is the express purpose of the *Allen* standard. As the court of appeals points out, "an injury is not compensable when it 'occur[s] at work because a pre-existing condition results in symptoms which appear during work hours without any enhancement from the workplace,' but it is compensable when it 'occur[s] because some ***condition*** or exertion required by the employment increases the ***risk of injury*** which the worker normally faces in his everyday life.'"[50] In the same paragraph, the court of appeals notes Professor Larson's explanation that the object of the standard that this Court adopted in *Allen* "'is to distinguish work-connected collapses from those that are due to normal progression of a disease.'"[51]

This is one of the very reasons that the Supreme Court developed the seminal standard in *Allen* – to reduce the chances of an employer bearing liability for an injury whose only relationship to work is little more than incidental. Another effect of this standard is that employees with preexisting conditions are less likely to be passed over for jobs because employers know that there is a mechanism in place to protect them

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[50] *Murray*, 2012 UT App 33 at ¶ 29 (quoting *Allen* at 25) (emphasis added) (bracketed material in original).

[51] *Id.* (quoting *Acosta v. Labor Comm'n*, 2002 UT App 67, ¶ 23, 44 P.3d 819) (quoting Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 46.03[4], at 46-18 (2001)).

from inheriting liability for injuries that have little, if anything, to do with any work-related conditions.

Considering these aims, it would be impossible to justify affording voluntary physical exertion a different standard than any other component of a person's work circumstances. If an employee with a preexisting condition cannot show that something about the employment circumstances surrounding his accident increased the risk that he faces in everyday life, then the employer should not bear liability for that employee's injuries. This is a basic principle of legal causation and nothing about the court of appeals' decision in this case alters or confuses the standard that this Court announced in *Allen* and that the Labor Commission and Utah appellate courts have applied since its publication in 1986.

In fact, the definition of the word "exertion" is much broader than the voluntary physical exertions that Mr. Murray has focused on in his brief. Bryan Garner, lexicographer and editor of *Black's Law Dictionary*, provides two definitions for the verb "exert": "(1) to put forth or apply (energy, force, strength, etc.) <the team members exerted all their strength and won the tug of war>; or (2) to make a physical or mental effort <you can't write well without exerting yourself>."[52] Considering this definition, the corresponding noun "exertion" necessarily includes myriad things beyond intentional physical exertions. In fact, under the light of this definition, essentially all of

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[52] Bryan A. Garner, *Garner's Modern American Usage*, 3rd ed. 70 (Oxford University Press 2009).

the elements of Mr. Murray's accident (the effort involved in maintaining his body posture, holding the lock, repositioning his feet and hands to catch his balance, even the application of the force of the wave on the boat) can be fairly viewed as exertional.

Mr. Murray argues that use of the adjectives "usual" and "unusual" may work when comparing workplace exertions to common non-employment exertions, but that such an analysis in comparing employment activities with non-employment activities is "just plain silly."[53] This argument cannot survive a reading of *Allen* itself. In summarizing the standard to be used to identify the presence or absence of legal causation in cases where there is a contributory preexisting condition, the *Allen* court explained:

> We believe an objective standard of comparison will provide a more consistent and predictable standard for the Commission and this Court to follow. In evaluating typical nonemployment activity, the focus is on what typical nonemployment activities are generally expected of people in today's society, not what this particular claimant is accustomed to doing. Typical activities and exertions expected of men and women in the latter part of the 20th century, for example, include taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings. By using an objective standard, the case law will eventually define a standard for typical "nonemployment activity" in much the way case law has developed the standard of care for the reasonable man in tort law.[54]

While the *Allen* court explained that a claimant with a preexisting condition would typically prove legal causation by showing an unusual or extraordinary exertion, the actual standard it prescribed is a comparison to "typical nonemployment activity." As

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[53] Br. of Pet. at 33.

[54] *Allen* at 32.

the court of appeals noted three years after the *Allen* decision, "it is important that the examples [listed by the *Allen* court] consist of ***a set of circumstances***, including as only one factor the weight of the object. Indeed, the court said the determination whether ***an activity*** is usual or unusual can only be made 'on the facts of each case.'"[55]

The court of appeals – as they did with the standard-of-review issue – engaged in a useful discussion about the *Allen* legal-causation standard and its application to this case.[56] The court of appeals correctly considered all of the circumstances involved in Mr. Murray's accident and concluded that, "[l]ooking at Murray's exertion as well as the working conditions that Murray faced at the time of the accident – including the outside force to which Murray reacted – we find nothing unusual or extraordinary when compared to everyday life."[57] The court of appeals' discussion and conclusion in this case represents an immaculate application of the *Allen* standard, including its requirement that the Commission and courts examine all employment conditions when considering legal causation. The court of appeals gave additional shape to the analysis by listing several examples of everyday activities that are comparable to Mr. Murray's accident. As they note, "people would not typically face Murray's exact scenario in everyday life, [but] it is similar to the activities and exertions common to everyday

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[55] *Smith & Edwards Co. v. Industrial Commission*, 770 P.2d 1016, 1018 (Utah Ct. App. 1989) (quoting *Allen* at 25) (emphasis added).
[56] *Murray v. Labor Commission*, 2012 UT App 33 at ¶¶ 28-39 (Utah Ct. App. 2012).
[57] *Id* at ¶ 35.

life."[58] The *Allen* standard is, by necessity, a test to be applied by analogy and the court of appeals underscored the Commission's decision by offering several situations that *consist of a set of circumstances* that are similar to those involved in Mr. Murray's accident. To reduce the *Allen* standard to a strict test of voluntary physical exertion as Mr. Murray proposes would strip it of its effect and render it incapable of accomplishing what it was designed to do.

We believe that the Commission and the court of appeals applied the *Allen* test exactly as it was meant to be applied and in the only way that can preserve it as a workable standard. We urge this Court to affirm.

Conclusion

We maintain that the court of appeals' opinion is a well-reasoned and well-articulated application of long-established principles of Utah workers' compensation law. We maintain that the court of appeals' decision is not only perfectly consistent with its own precedent and the prior decisions of this Court, but also with both the letter and intent of the *Allen* decision. The legal questions at issue in this case are not novel or new; they are basic, fundamental questions that this Court has more than adequately addressed, beginning with the *Allen* decision itself. The court of appeals did not announce any new law or apply any different standard than what it and this Court have applied in legal-causation cases decided after *Allen*. This Court has already settled the

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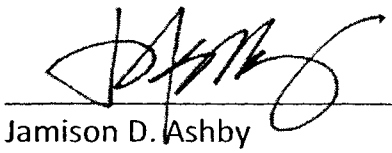
[58] *Id.*

questions of state law at issue in this case and the court of appeals – using a consistent and appropriate standard of review – properly applied that law to the facts. We ask this Court to affirm the court of appeals' decision.

Dated this 16th day of October 2012



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Dated this 16th day of October 2012

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Certificate of Service

On October 16, 2012, I mailed two hard copies of this Brief and two CDs with searchable PDF copies of the brief in the case of *Michael Murray v. Labor Commission,* et al., Case No. 20120232-SC, to:

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